

December 3, 2007

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Application for Exception

Name of Case: BarMac, Inc. d/b/a Highway Express and Highway Express 2
Date of Filing: November 13, 2007
Case No.: TEE-0051

On November 13, 2007, BarMac, Inc. d/b/a Highway Express and Highway Express 2 (collectively “Highway Express”), filed an Application for Exception with the Department of Energy (“DOE”) Office of Hearings and Appeals (“OHA”). The firm requests temporary relief from its requirement to prepare and file the Energy Information Administration (“EIA”) Form EIA-782B, entitled “Resellers’/Retailers’ Monthly Petroleum Product Sales Report.” As explained below, we have determined that Highway Express’ request should be granted.

I. Background

The DOE’s Energy Information Administration (EIA) is authorized to collect, analyze, and disseminate energy data and other information.¹ The EIA-782B reporting requirement grew out of the shortages of crude oil and petroleum products during the 1970s. In 1979, Congress determined that the lack of reliable information concerning the supply, demand and prices of petroleum products impeded the nation’s ability to respond to the oil crisis. It therefore authorized the DOE to collect data on the supply and prices of petroleum products. This information is used to analyze trends within petroleum markets. Summaries of the information and the analyses are reported by EIA in publications such as “Petroleum Marketing Monthly.” This information is used by Congress and state governments to project trends and to formulate national and state energy policies. Access to this data is vital to the nation’s ability to anticipate and respond to potential energy shortages.²

Form EIA-782B is a monthly report, pursuant to which resellers and retailers report the volume and price of sales of motor gasoline, No. 2 distillates, propane, and residual fuel oil. In order to minimize the reporting burden, the EIA periodically selects a relatively small sample of companies to file Form EIA-782B³ and permits reporting firms to rely on reasonable estimates.⁴

¹ 15 U.S.C. § 772(b); 42 U.S.C. § 7135(b).

² See H.R. Rep. NO. 373, 96th Con., 1st Sess., reprinted in 1979 U.S. Code Cong. & Admin. News 1764, 1781 (H.R. Report 373).

³ Firms that account for over five percent of the sales of any particular product in a state or do business in four or more states, designated as certainty firms, are always included in the sample of firms required to file the form. A random sample of other firms is also selected. This random sample changes approximately every 24 to 30 months, but a firm may be reselected for subsequent samples. A firm that has been included in three consecutive random samples will generally not be included in a fourth consecutive sample, but may be included in a later sample.

II. Exception Criteria

OHA has the authority to grant exception relief where the reporting requirement causes a “serious hardship, gross inequity or unfair distribution of burdens.”⁵ Since all reporting firms are burdened by reporting requirements, exception relief is appropriate only where a firm can demonstrate that it is adversely affected by the reporting requirement in a way that differs significantly from similar reporting firms.

When considering a request for exception relief, we must weigh the firm’s difficulty in complying with the reporting requirement against the nation’s need for reliable energy data. Thus, mere inconvenience does not constitute a hardship warranting relief.⁶ Similarly, the fact that a firm is relatively small or has filed reports for a number of years does not constitute a hardship warranting relief.⁷ If firms of all sizes, both large and small, are not included in the survey, the reporting sample’s estimates and projections will be unreliable.⁸

OHA has granted relief from the reporting requirement under various circumstances. For example, we have granted relief where the firm’s financial situation is so precarious that the additional burden of meeting the DOE reporting requirements threatens the firm’s continued viability;⁹ the firm’s only employee capable of preparing the report is ill and the firm cannot afford to hire outside help;¹⁰ extreme or unusual circumstances disrupt a firm’s activities;¹¹ or, a combination of factors resulting from unavoidable circumstances makes completing the form impracticable.¹²

⁴ Form EIA-782B requires that the firm make a good faith effort to provide reasonably accurate information that is consistent with the accounting records maintained by the firm. The firm must alert the EIA if the estimates are later found to be materially different from actual data.

⁵ 42 U.S.C. § 7194; 10 C.F.R. § 1003.25(b)(2).

⁶ *Glenn Wagoner Oil Co.*, 16 DOE ¶ 81,024 (1987).

⁷ *Mulgrew Oil Co.*, 20 DOE ¶ 81,009 (1990), *see also Rice Oil Co., Inc.*, 26 DOE ¶ 81,010 (1997) (stating, “We have consistently ruled that the length of time that a firm has been required to file an EIA form does not alone constitute grounds for exception relief”).

⁸ *Mulgrew Oil Co.*, 20 DOE ¶ 81,009 (1990).

⁹ *Mico Oil Co.*, 23 DOE ¶ 81,105 (1994) (firm lost one million dollars over previous three years); *Deaton Oil Co.*, 16 DOE ¶ 81,206 (1987) (firm in bankruptcy).

¹⁰ *S&S Oil & Propane Co.*, 21 DOE ¶ 81,006 (1991) (owner being treated for cancer); *Midstream Fuel Serv.*, 24 DOE ¶ 81,203 (1994) (three month extension of time to file reports granted when two office employees simultaneously on maternity leave); *Eastern Petroleum Corp.*, 14 DOE ¶ 81,011 (1986) (two month extension granted when computer operator broke wrist).

¹¹ *Little River Village Campground, Inc.*, 24 DOE ¶ 81,033 (1994) (five months relief because of flood); *Utilities Bd. of Citronelle-Gas*, 4 DOE ¶ 81,025 (1979) (hurricane); *Meier Oil Serv.*, 14 DOE ¶ 81,004 (1986) (three month extension granted where disruptions caused by installation of new computer system left the firm’s records inaccessible).

¹² *Ward Oil Co.*, 24 DOE ¶ 81,002 (1994) (ten month extension granted where long illness and death of a partner resulted in personnel shortages, financial difficulties and other administrative problems).

III. Highway Express' Application for Exception

Highway Express and Highway Express 2 are small, “mom-and-pop” gas stations and convenience stores based in Chadron, Nebraska.¹³ Highway Express is currently participating in its first reporting sample, which began in August, 2004.¹⁴ Sandy Ledgerwood of Highway Express contacted EIA to request that it be relieved of its requirement to file Form EIA-782B.¹⁵ EIA forwarded the request to OHA for consideration.¹⁶ After reviewing the electronic mail message from EIA, we determined that we had insufficient information to evaluate the request. We then contacted Ms. Ledgerwood in order to gather more information.¹⁷

Ms. Ledgerwood informed OHA that completing the monthly reporting form has become burdensome and constitutes an extreme hardship because the employee solely responsible for administrative functions at Highway Express is battling cancer and is currently hospitalized.¹⁸ She also related that the only other employees in the company are four to five part-time cashiers at each of the convenience stores.¹⁹ According to Ms. Ledgerwood, there is no other assistance with performing administrative functions, except on occasion from her one daughter, who lives 300 miles away from Highway Express.²⁰ Further, the responsible employee will continue to undergo cancer treatment and will be unable to work in the near future, all of which has made completing the Form impracticable.²¹ For these reasons, Highway Express requests temporary relief from its obligation to file Form EIA-782B, while the employee obtains treatment for their illness.²²

IV. Analysis

Although we have previously stated that a firm's small size is by itself an insufficient basis for granting relief, Highway Express' situation is dramatically different from that of other small reporting firms. The employee's illness and lack of office help cause Highway Express to be burdened by the filing requirement to a far greater extent than are other small resellers.

In *S&S Oil and Propane Co. (S&S)*,²³ we granted relief to an applicant whose situation was similar to that faced by the employee at Highway Express. In that case, the applicant, who was the only office worker, had to work nights and weekends to keep her business in operation.²⁴ Further, she was afflicted with cancer, had recently undergone two surgeries and chemotherapy

¹³ See Memorandum of Telephone Conversation between Sandy Ledgerwood, Highway Express, and Diane DeMoura, OHA, dated November 13, 2007.

¹⁴ See Electronic Mail Message from Tammy Heppner, EIA, to Diane DeMoura, OHA, dated October 29, 2007.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ See Letter to Sandy Ledgerwood, Highway Express, from Diane DeMoura, OHA, dated November 2, 2007.

¹⁸ See Memorandum of Telephone Conversation between Sandy Ledgerwood, Highway Express, and Diane DeMoura, OHA, dated November 13, 2007.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *S&S Oil & Propane Co.*, 21 DOE ¶ 81,006 (1991).

²⁴ *Id.*

and was under a doctor's care for her life-threatening condition.²⁵ In granting the application, we stated that the debilitating physical and emotional effects of the applicant's illness, coupled with the severe workload caused by her lack of office employees, was sufficient cause to grant S&S relief from its obligation to file Form EIA-782B.²⁶

In view of our holding in S&S, we find that the employee's current medical condition and workload is sufficient cause to grant Highway Express temporary relief from its obligation to file Form EIA-782B. Accordingly, we have determined that a temporary exception through December 2008 should be granted.

It is Therefore Ordered That:

- (1) The Application for Exception filed by BarMac, Inc. d/b/a Highway Express and Highway Express 2, Case No. TEE-0051, be and hereby is granted as set forth in paragraph (2) below.
- (2) Notwithstanding the instructions pertaining to Form EIA-782B, BarMac, Inc. d/b/a Highway Express and Highway Express 2, is hereby relieved of the requirement to file Form EIA-782B for the year December 2007 through December 2008.
- (3) This is the final order of the Department of Energy.

Poli A. Marmolejos
Acting Director
Office of Hearings and Appeals

Date: December 3, 2007

²⁵ *Id.*

²⁶ *Id.*